



ASSOCIATION OF AMERICAN RAILROADS

224432

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January 28, 2009

Honorable Anne Quinlan
Acting Secretary
Surface Transportation Board
Attn: Ex Parte No. 683
395 E St., S.W.
Washington, DC 20423

Re: STB Ex Parte No. 683, Passenger Rail Investment and Improvement
Act of 2008

NOTICE OF INTENT TO PARTICIPATE

Dear Acting Secretary Quinlan.

Pursuant to the Notice served by the Board on December 23, 2008 in the above proceeding, the Association of American Railroads ("AAR") hereby submits its Notice of Intent to Participate and appear at the hearing in the proceeding on February 11 2009.

The AAR will be represented by Edward R. Hamberger, its President and Chief Executive Officer. A time of ten minutes is requested for the AAR's oral testimony. Attached is a copy of the AAR's Written Testimony.

In the event that the Board arranges for witnesses to appear in panels at the hearing, the AAR requests that its witness be on a panel with witnesses appearing on behalf of Class I railroads.

Respectfully submitted,

Louis P. Warchot
Counsel for the Association of
American Railroads

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB EX PARTE NO. 683

**PASSENGER RAIL INVESTMENT
AND IMPROVEMENT ACT OF 2008**

**WRITTEN TESTIMONY OF THE
ASSOCIATION OF AMERICAN RAILROADS**

JANUARY 28, 2009

Introduction

The Association of American Railroads (AAR) submits this testimony on behalf of its freight railroad members in response to the Notice issued by the Surface Transportation Board (STB) on December 23, 2008, seeking comments on the STB's new responsibilities under the Passenger Rail Investment and Improvement Act of 2008 ("Act"). The AAR's freight railroad members operate approximately 72 percent of the freight rail industry's line haul mileage, produce 95 percent of its revenues, and employ 92 percent of its employees. Amtrak also is a member of AAR, as are several commuter railroads.

While the AAR is presenting this testimony on behalf of its freight railroad members only, the freight railroads are successful partners with passenger railroads all across the country. Around 97 percent of the 22,000 miles over which Amtrak operates are owned by freight railroads. In addition, hundreds of millions of commuter trips each year occur on commuter rail systems that operate at least partially over tracks or right-of-way owned by freight railroads.

Application of the Passenger Rail Investment and Improvement Act of 2008 to the STB

As the STB indicated in its Notice, the Act confers authority upon the STB in certain areas involving rail passenger transportation. This testimony addresses two areas of significance to freight railroads: intercity passenger train performance standards and non-binding mediation for commuter passenger rail issues.¹

Under Section 207 of the Act, the STB is to be consulted by the Federal Railroad Administration (FRA) working, in conjunction with Amtrak, in the FRA's development of metrics and standards to measure the performance and service quality of intercity passenger

¹ Another provision of the Act, Section 217, provides for access to Amtrak equipment and services by a State in certain circumstances when an entity other than Amtrak is chosen by the State to provide passenger rail service.

trains. Once those standards are established, the STB, under Section 213 of the Act, is responsible for investigating compliance with, and enforcement of, the new standards

Specifically, the STB is given authority, under certain circumstances, to investigate failures by Amtrak to meet on-time performance or service quality standards. The STB is to determine whether, and to what extent, Amtrak delays or Amtrak's failure to meet minimum standards are due to causes that could reasonably be attributable to Amtrak or to the freight railroad(s) over whose tracks Amtrak operates. As part of this process, the STB can recommend ways to improve the service quality and on-time performance of trains that do not achieve a certain standard. (49 U.S.C. §24308(f)(1)). Finally, the STB can assess damages if it determines that Amtrak delays or Amtrak's failure to achieve service standards result from a freight railroad's failure to give preference to Amtrak. (49 U.S.C. §24308(f)(2)).

Thus, the STB has a twofold obligation under Sections 207 and 213: to provide input during the development of the new standards, and to enforce those standards once they have been developed. While the latter role affords the STB more specific authority, both roles provide an opportunity for the STB to offer the benefit of its expertise and understanding of freight railroad operations and the consequences to individual railroads and the entire rail network of actions taken under the Act.

Under Section 401 of the Act, the STB has authority to conduct non-binding mediation between freight railroads and public transit or commuter authorities with respect to track or right-of-way usage. This provision also gives the STB the opportunity to ensure that the impact of passenger operations on freight railroads and the freight rail network is adequately considered.

The Benefits of Both Freight and Passenger Rail Must be Preserved

Freight railroads fully support efforts to grow passenger rail where needed. However, growth in passenger rail must allow freight rail transportation services to be preserved and grow as well.

Any effort to improve passenger service will, by necessity, affect freight railroads. Except for parts of the Northeast Corridor (NEC), virtually no rail rights-of-way are dedicated solely to intercity passenger rail service. Consequently, at least for the foreseeable future, most intercity passenger service, as well as much new commuter rail service, must be operated on the rights-of-way of freight railroads - - rights-of-way used by the freight railroads to serve the immense freight transportation needs of our nation safely, efficiently, and reliably.

In that regard, SIB action, whether focused on measurements and standards for intercity passenger performance or commuter rail mediation, must be based on the premise that both passenger and freight rail provide substantial public benefits. For its part, passenger rail takes automobiles off the highways, enhances public mobility, and reduces congestion at airports and pressure on our aging air traffic control system.

America's freight railroads are also indispensable, providing cost-effective transportation vital to the national economy. Simply put, whenever Americans grow something, eat something, mine something, make something, turn on a light, or get dressed, it is likely that railroads were involved somewhere along the line. Without freight railroads, our economy could not function. Looking ahead, America cannot continue to prosper in an increasingly-competitive global marketplace without maintaining the best-in-the-world freight rail system.

In addition to their vital contribution to the national economy, freight railroads also provide significant other benefits. They are at least three times more fuel efficient than trucks. Their fuel efficiency — enabling railroads to move a ton of freight an average of 436 miles per gallon of fuel — means significant fuel savings and correspondingly lower greenhouse gas emissions.² Because a single train can take 280 or more trucks off the nation's already-overcrowded highways, freight railroads reduce highway gridlock and the pressure to build costly new highways. They also directly provide approximately 180,000 high-paying jobs and indirectly support countless other jobs. Looking ahead, the contribution to the economy and the other benefits that freight rail transportation provides will become even more pronounced as transportation demands increase and as the nation's highways become more congested.

Thus, it is essential that the sometimes-competing interests of freight and passenger rail service be taken into account by all of the stakeholders. Freight and passenger rail must be viewed in the context where the value and vital interests of both should be preserved and enhanced.³

Capacity Should Be a Fundamental Consideration in All STB Deliberations Under the Act

Prior to the partial deregulation afforded by the Staggers Rail Act of 1980, and especially going back to when Amtrak was created in 1971, the U.S. rail system had

² The AAR estimates that if 10 percent of the long-distance freight that currently moves by truck moved by rail instead, fuel savings would exceed one billion gallons each year — and greenhouse gas emissions would fall by more than 12 million tons. According to Environmental Protection Agency conversion ratios, that's equivalent to taking 2 million cars off the road or planting 280 million trees.

³ That's why freight railroads are enthusiastic members of OneRail, a new coalition to advance railroading nationwide. OneRail supports the expansion of public and private investment in freight rail, the expansion and strengthening of America's passenger rail network, and state efforts to seek an ongoing dedicated funding source for intercity passenger rail expansion, including federal-state partnership and cost sharing agreements similar to those that built America's federal-aid highways and transit systems.

enormous excess capacity. By 1971, heavily-subsidized interstate highways and air travel decimated rail passenger volume. Immediately prior to Amtrak's creation, it was widely expected that railroads would continue to exit the long-distance passenger business until all such trains (except perhaps some NEC trains) disappeared.

In addition, much of the rail industry's freight also diverted to the new highways. Most knowledgeable observers also expected that freight railroads would continue to shrink as they lost business to trucks and other competitive options. These huge traffic losses, combined with outdated and counterproductive government regulation, severely undermined railroads' financial health. By 1976, more than 47,000 miles of freight-owned track were subject to slow orders due to unsafe conditions, representing some 15 percent of the entire national network.⁴ Deferred track maintenance was in the billions of dollars, and billions more were needed for bridges, terminals, and locomotives. In 1971, few would have imagined the "Rail Renaissance" that has become apparent in recent years.

Thankfully, the implementation of more balanced regulation in 1980 revitalized the rail industry and enabled freight railroads to rejuvenate their infrastructure with private dollars. They rationalized trackage, rebuilt their infrastructure, and purchased new generations of rail cars and locomotives. They also became much more productive. As a result, today's railroads are vastly more efficient than they were in the 1970s.

One simple measurement of this is fuel efficiency. In 1972, Amtrak's first full year of operation, our nation's freight railroads moved one ton of cargo an average of 199 miles on a gallon of fuel. Today, that figure is 436 miles per gallon.

⁴ U.S. Department of Transportation, *A Prospectus for Change in the Freight Railroad Industry*, October 1978, p. 25

As the railroads gradually recovered, freight rail traffic grew — so much so, in fact, that on many rail lines, demand for freight service has reached (or nearly reached) capacity. The result has been congestion and capacity constraints on many rail routes. Different railroads vary in the degree to which their capacity is constrained, but there's no question that there is much less room on America's rail network today than there was even a few years ago.

With respect to intercity passenger operations specifically, the more intense use of rail infrastructure by the freight railroads as well as passenger carriers has certainly affected Amtrak performance. Freight railroads have faced increasing challenges in moving Amtrak trains on schedules that were far more realistic in past years when freight railroads had significant excess capacity. Today, when an Amtrak delay occurs, substantial freight traffic means that Amtrak trains are often less able to recover lost time. Exacerbating the situation is the fact that a number of Amtrak routes coexist with freight operations not only on single-track corridors, but also on heavily-used, capacity-constrained double-track corridors.

The severe downturn in the economy now underway has led to a lull in rail traffic growth and a lessening of some rail capacity constraints. Experts agree, however, that this lull will be temporary: the long-term forecast is for steadily higher freight rail traffic. The U.S. Department of Transportation has forecast that freight railroad demand will rise 88 percent by 2035 from 2002 levels. Even if the current downturn delays this growth by a few years, if America is to have the rail capacity it needs in the years ahead, it must be given appropriate attention by railroads and policymakers.

Freight railroads are fully aware of the capacity constraints they face. Using creativity, technology, and massive re-investments in track, bridges, tunnels, signals, locomotives, rail cars, and other equipment, freight railroads are working hard every day to

help ensure America has the rail capacity it needs. Freight railroads re-invested more back into their systems in 2007 than ever before — a symbol of the seriousness with which they are approaching the capacity issue. Shippers, consumers, and America's economy have benefited enormously from these investments.

For a variety of reasons — including directness between origin and destination points and quality of track — the freight tracks on which Amtrak operates are typically among the most desirable in terms of freight-carrying potential. Thus, Amtrak trains operating on freight-owned track have also often been beneficiaries of the massive freight rail re-investments.

As noted above, in some areas, existing or expected heavy freight traffic means there is little or no spare capacity for passenger trains. In these areas, new passenger trains cannot operate unless new capacity is added.⁵ Moreover, freight railroads cannot be expected to have on hand appreciable amounts of spare capacity to be available for use by passenger railroads, and clearly not the excess capacity that existed when Amtrak was formed in 1971. To call upon the freight railroads to invest billions of dollars to restore excess capacity that weighed them down in 1971 so that passenger trains can operate exactly as they did then would create an unrealistic financial burden for the freight railroads and would destroy the network efficiencies that have made the U.S. rail system the world's most responsive and productive.

As demand on the rail system increases, it is vital that freight railroads, Amtrak, and policymakers work together to target public investments in rail infrastructure that will foster economic development and personal mobility in a reasonable and cost-effective way.

⁵ Funding for new capacity made for the benefit of passenger trains is a public responsibility. Freight railroads should only be expected to pay for new capacity that benefits them — not for capacity enhancements made for the benefit of passenger rail.

In addition, the development and interpretation of appropriate intercity passenger rail metrics and standards must take into account capacity effects due to the network nature of railroad infrastructure. Much of the freight delivered by railroads travels on the lines of more than one carrier. Many Amtrak routes also utilize the lines of multiple carriers. Obligations imposed on one carrier in one location can impact other carriers in the network. For example, if one freight train must be directed to a side track to accommodate an Amtrak train, the ensuing delay could ultimately result in the delay of multiple trains, waiting to receive traffic from the delayed train, at interchange points much further down the line. Moreover, when delays occur on the freight rail network, the impact can go far beyond the railroad or railroads involved.

Key Considerations for Measuring Performance

With much of the rail network likely to be operating at or near full capacity in the years to come, implementation of the Act will pose serious challenges for all involved. The development and evaluation of measurements and standards to assess Amtrak performance will require a clear understanding of the nature of the delays that occur on a rail system. A methodology or system must be devised that properly attributes the cause of delays to the appropriate party, or to neither party; distinguishes avoidable delays from unavoidable delays; and involves Amtrak and the freight railroads in a process that minimizes conflicts and jointly sets realistic schedules for Amtrak trains, given the constraints and operational realities of the U.S. rail system.

Several key considerations are outlined below that are pertinent to the measurement and assessment of Amtrak performance. Freight railroads urge the SIB to promote these concepts when it provides input to the FRA. And, to the extent that new standards do not

fully take into account these considerations, freight railroads respectfully urge the STB to keep them in mind as factors that mitigate any failure to meet Amtrak performance standards.

The Causes of Delay Must Be Properly Identified and Understood

Amtrak and the freight railroads are challenged, and somewhat frustrated, by the difficulty in accurately identifying the causes of particular delays to Amtrak trains. Freight railroads' understanding is that when an Amtrak train travels on a host railroad, Amtrak attempts to perform this task using a report called the Conductor Delay Report (CDR). To be sure, freight railroads believe that Amtrak conductors discharge this responsibility to the best of their ability. However, freight railroads are concerned that conductors may not be able to reliably and accurately report the cause of every delay or precisely measure the length of time of every delay, and the CDRs may reflect this.⁶ Moreover, the primary responsibility of an Amtrak conductor is to ensure the safe operation of the train and the safety of its passengers. Because of these principal duties, a conductor may not be able to give full attention to delays.

Freight railroads believe that new technologies could be used to improve the train performance data collection process. Existing computer systems, for example, can provide reliable information. There may be other alternatives as well — *e.g.*, placing GPS devices on Amtrak trains. While technology will not be able to address and categorize all types of delay, it would likely reduce the conflicts between Amtrak and freight railroads regarding data issues, such as the duration of a delay. In the interim, freight railroads and Amtrak must work with all stakeholders to improve the data collection process, including implementing processes in the host railroads' dispatching centers.

⁶ As just one hypothetical example, a conductor might not be aware of a grade crossing accident 50 miles ahead that causes trains in the region to be delayed

To date, there is no single metric regarding Amtrak on-time performance that fully reflects the complexity of day-to-day operations on freight railroads — a point acknowledged by the FRA. In its reports to the U.S. Senate under the Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2008, the FRA has discussed a few of the many different ways that on-time performance (OTP) could be measured, but noted that “there is no single perfect measure of reliability.”⁷

In addition to determining what yardstick to use to measure reliability, a second equally-important fundamental issue is how to classify delays to passenger trains. There are three broad categories of delays: 1) those caused by or otherwise attributable to Amtrak; 2) those caused by or otherwise attributable to freight railroads; and 3) delays for which attribution is either not known or do not clearly belong to either freight railroads or Amtrak. Each of these is discussed below.

Delays Attributable to Amtrak

In its operating agreements with host freight railroads, Amtrak takes responsibility for some delays and acknowledges that the host railroad should not be penalized for those delays.

These types of delays may include, but are not limited to:

- A. *Amtrak equipment failures*, such as locomotive failures and other equipment problems (which often cause delays to freight trains or require the host railroad to divert a freight locomotive to assist the Amtrak train).
- B. *Station dwell*. Station stops that are longer than reflected in the schedule is one consequence of higher Amtrak ridership. For example, scores of skiers might board the “California Zephyr” on a winter Sunday at Glenwood Springs, CO. Loading their bags and skis delays the train. This delayed train ultimately may delay later Amtrak and freight trains.
- C. *Meets between Amtrak trains*. When Amtrak trains move in opposite directions on single track railroads, the train dispatcher must find a side track

⁷ 2008 letter (undated) from FRA Administrator Joseph H. Boardman to The Honorable Robert C. Byrd.

where one can pull over to “meet” the other. This necessarily causes a delay to one of the trains

Delays Attributable to Host Freight Railroads

Freight railroads are also responsible for some delays to Amtrak trains. The most common types of delays that could be attributable to freight railroads are:

- A. *Freight train interference.* Freight railroads accept responsibility for delays to Amtrak trains resulting from freight traffic on their railroad.
- B. *Dispatching decisions.* Because Amtrak trains are entitled to dispatching preference, delays caused by non-conforming dispatching controlled by a host railroad would be attributable to the host railroad.
- C. *Freight equipment failures.* Freight railroads are responsible for delays caused by freight rail equipment failures (Today, delays caused by freight equipment failures are sometimes misreported as “dispatching delays.” A separate delay category should be established for these types of delays)
- D. *Slow orders (speed restrictions)* All railroads reduce the speed on their tracks for safety reasons when they conclude that the condition of the tracks or surroundings requires it. Some levels of slow orders are also required after maintenance has been performed to ensure the safe operation of trains utilizing the track.
- E. *Defect detection.* All railroads and the FRA regularly operate “detector cars” to look for track defects that are not visible to the naked eye. After a detector car passes, the track is likely to have slow orders or speed reductions imposed
- F. *Broken rails.* When temperature changes are extreme, rail sometimes will break, requiring trains to move slowly or stop until repairs are made.
- G. *Track maintenance.* Devoting sufficient time to needed maintenance will produce unavoidable delay in the short term but will improve service reliability in the long term. It is also critical from a safety perspective.

It is important to note that in the case of slow orders, defect detection, broken rails, and maintenance, the cause of the delay is, ultimately, the freight railroad. However, in each case, safety must take precedence over everything else, and railroads should be granted a reasonable amount of time to make repairs (defects cannot be repaired instantly) or undertake needed maintenance before they are penalized for delays associated with these causes. If a railroad fails to make timely repairs, it should be held accountable. Likewise, any new

performance standards or schedules must take into account the need for maintenance and repair projects.

Delays Attributable to Neither Amtrak Nor Host Freight Railroads

The exposure of railroads to public and other third-party activities often results in delays that are not attributable to Amtrak or to the host freight railroad. In these cases, the delays should not be counted against either party — and the freight railroad should not be punished — since neither party has any control over the causes of these delays. Examples include:

- A. *Grade-crossing accidents or trespasser incidents.* Thousands of grade-crossing accidents occur each year on the nation's freight railroads. Law enforcement officials require trains involved in accidents to wait until investigations are completed. These can cause major delays not only to the train involved but also to other trains.
- B. *Directives from public officials.* Officials sometimes order freight railroads to halt operations, particularly during law enforcement activities. Law enforcement officers even may wish to search an Amtrak train if a known criminal or suspect may be on board that train.
- C. *Commuter train interference.* As the number of commuter rail systems operating on freight railroads has increased, there is a potential for more conflicts and therefore more delays to Amtrak and freight trains.
- D. *Acts of nature.* Trains are delayed by forest fires, grass fires, snowstorms, floods, hurricanes, tornadoes, mudslides, earthquakes, rock slides, excessive heat, excessive cold, and other natural events. These events may affect trains ahead of an Amtrak train, causing an unexpected delay to the Amtrak train.
- E. *Consequential effects of an initial delay.* Every day on freight railroads, train dispatchers plan thousands of "meets" and "passes." In single track territory, a train meet or pass can only occur where there is a siding available to hold one of the trains. Often, however, train dispatchers' plans are disrupted when something goes wrong and a track is blocked — e.g., a crossing accident occurs, equipment fails, etc. These events can have cascading effects across the network, can cause consequential delays to other trains; and are rarely reported under the initial or root cause of the delay.

As the foregoing demonstrates, host freight railroads are not responsible for all delays to Amtrak trains, and not all delays are avoidable. Railroads operate in a demanding and

dynamic environment in which delays, regrettably, occur from time to time. This means that performance metrics and standards must make a realistic assessment of passenger train delays by incorporating the myriad causes of, and responsibilities for, such delays.

In addition, schedules must also take these factors into account.⁸ Any measurement is rendered ineffective if the underlying schedule is not feasible. Freight railroads have often been unfairly penalized for failure to meet unrealistic schedules that do not take into account the underlying infrastructure, traffic volumes, and capacity constraints.

There Should Be Transparency In Public Measurements of Performance

Today, the primary public measurement of an Amtrak train's on-time performance is whether it arrives on time at its final destination, a measurement commonly referred to as "Endpoint OIP." However, Endpoint OTP can be misleading in how it portrays the performance of freight railroads, for at least two major reasons.

First, an Amtrak train may travel over the tracks of multiple railroads, including its own, during a single trip. However, Endpoint OIP does not reflect the performance of each participant. For example, Amtrak's "Cardinal" train passes over the tracks of seven railroads just in its final 30 miles into Chicago from Washington. Endpoint OTP does not allocate responsibility for delays among the participants.

Second, Endpoint OTP does not allocate responsibility based on the types of delays like those listed earlier. Endpoint OTP is the culmination of all events that occur over all segments of a train's trip and does not reveal the underlying components. Unfortunately, the final host railroad publicly appears to be responsible for all delays based on this measurement.

⁸ Using scientific modeling to adjust Amtrak schedules in constrained corridors would provide Amtrak customers with a more accurate expectation of transit time until any longer-term infrastructure solutions could be implemented. Indeed, schedules should address the above-detailed operational considerations in all cases, not just when a rail line on which passenger trains operate is capacity constrained.

even though the delays may have been caused by Amtrak, another host railroad, a trespasser, a tornado, or any number of other factors.

For these reasons, public scorecards on Amtrak performance that are based on Endpoint OIP offer an inappropriate reference point for Amtrak passengers and policymakers to understand the key drivers of performance and how various factors contribute to it. Lack of a complete understanding of the measurements leads to misconceptions about freight rail performance, generates negative press and public perceptions, and does not accurately reflect the challenges facing freight railroads.

A performance measurement system must accurately and transparently segregate Amtrak performance into its components, only one of which is the performance of each participating freight railroad. It should also reflect the extent of delays attributable to each source, rather than simply “on-time” or “late.” Properly formulated and evaluated, it would give policymakers a useful tool to assess Amtrak’s performance and help foster Amtrak service improvements.

Priority Must Recognize Network Constraints

Under the Act, STB may award damages if Amtrak delays or failure to achieve minimum standards are attributable to a freight railroad carrier’s failure to provide preference to Amtrak. (49 U.S.C. §24308(f)(2)). No topic in the Amtrak-freight railroad relationship is subject to more debate than the meaning of Amtrak’s statutory dispatching priority over freight trains.

Some contend that Amtrak’s priority is absolute — *i.e.*, that an Amtrak train should never be delayed for a freight train and that host railroads should have no discretion to apply “reasonable” priority in dispatch. The fact is, absolute priority would literally bring some rail

segments to a halt during periods of heavy traffic. For example, on a two-track railroad with slower freight trains running every 20-30 minutes, on average, in each direction and Amtrak trains coming up from behind them in both directions, absolute priority would be impossible. On a single-track line with sidings, absolute priority would also be unworkable. To avoid even a one-minute delay to an Amtrak train, a dispatcher might have to hold an oncoming freight train for up to an hour (depending on siding spacing and speed limits) and, more importantly, put all of the trains behind that train into sidings. If an oncoming Amtrak train were added to the mix, there would be no physical way to move either passenger train. In this case, absolute priority would create a dispatcher's nightmare — a gridlocked railroad.

Absolute priority would have other serious negative impacts, including congestion (in a period of high traffic demand, absolute priority across the national network could cause a system-wide meltdown); wasted fuel and higher emissions (when a freight train waits for an Amtrak train, its locomotives continue to burn fuel and generate emissions); increased freight costs (*e.g.*, the cost of crews forced to wait for Amtrak trains to pass); and potential highway impacts (rail traffic could divert to trucks if passenger-related factors negatively affect freight rail service).

Freight railroads are not suggesting that any of these factors justify denying Amtrak priority over freight traffic. However, they illustrate that extreme concepts of priority should not be considered acceptable public policy.

Instead, the ultimate question in this debate returns to rail line capacity. It is in the public interest that both passenger and freight trains operate efficiently. If passenger schedules and performance standards are created and adjusted to reflect the operating conditions and capacity of a rail line, dispatching disputes are much less likely to arise.

Non-Binding Mediation Regarding Commuter Passenger Operations Should Address Property, Operations, and Liability Issues

Under Section 401 of the Act, the STB has been granted the authority to conduct non-binding mediation to assist in the resolution of disputes of issues between freight railroads and commuter or potential commuter railroads concerning the terms of access by the commuter carrier to the lines or rights-of-way of the freight railroad.

Many existing and proposed commuter railroads in the United States operate (or hope to operate) at least partially on tracks or corridors owned by freight railroads. Before it can operate on freight-owned property or acquire a freight railroad right-of-way, a commuter railroad must first reach voluntary agreement with the freight railroad on various issues, such as hours of passenger operations, the number of commuter trains, access fees, allocation of liability, track modifications, ongoing investment, and many others.

These issues can often be resolved, as shown by the significant growth in commuter rail service in recent years. Sometimes, though, an agreement is not reached. It is in these situations that the Act requires the STB to provide a non-binding mediation process to determine whether terms of access agreeable to both parties may be developed. It is important that all parties recognize that the process the STB is called upon to develop is not one designed to mandate access to freight railroads by commuter railroads or authorities. Rather, it is designed to assist the parties in the voluntary access negotiation process.

The AAR believes that the non-binding mediation process provided by the Act will facilitate communication between third parties in those instances where the freight rail issues may not always be fully appreciated. The STB's regulations at 49 CFR 1109.4 provide an appropriate framework for such mediation. Especially significant is the requirement under 49 CFR 1109.4 (d) that the mediation process be private and confidential. This will allow for

open and candid discussion of issues between a freight railroad and a commuter agency in circumstances where a freight railroad might otherwise be reluctant to share proprietary information if the information were to immediately be in the public domain.

The STB rules also provide an appropriately flexible structure to accord the parties significant latitude in their discussions. Except for time limits on the length of the proceeding (which can be extended pursuant to request by the parties), there are no other significant limitations. However, while the mediation process should be as flexible as possible, the AAR believes that, either through regulations or a policy statement, the STB should recognize certain principles to be addressed in any such mediation involving access to freight rail property.

Voluntary Agreement

First and foremost, the STB should recognize the principle that freight railroads' lines are private property and their use by commuter authorities must be granted voluntarily. Absent voluntary agreement, private freight railroads should not be forced to allow commuter trains to use freight rail assets any more than any other private business should be forced to grant another company use of its assets without its consent.

Full Compensation for Service Provided by Freight Railroads

When a freight railroad is unable to reach agreement with a commuter railroad, it is often because the commuter railroad is asking the freight railroad to subsidize the commuter railroad in one way or another — perhaps by asking the freight railroad to accept below-market access fees or reduced liability protection, or to pay for capacity enhancements or track upgrades needed by the commuter railroad. Freight railroads should be fully compensated for all costs associated with hosting commuter trains, including both capital

expenditures and ongoing operating requirements. Third party firms that supply commuter railroads with locomotives, rail cars, fuel, or other items are not expected to subsidize the commuter railroad. The same should apply to freight railroads.

The issue of full compensation has become especially important in recent years. As discussed earlier, rising freight volumes have led to increasing freight rail capacity constraints. Because of these capacity constraints, train "slots" on freight-owned tracks have become increasingly valuable. If commuter trains fill these slots at less than compensatory prices, the result is a major cross-subsidy from freight to commuter service. It also limits the overall size of the freight rail market in those corridors (because slots are unavailable to freight trains) and erodes the reliability and flexibility freight railroads can offer to their freight customers

Investment in Capacity for Commuter Requirements

On most freight-owned tracks and corridors, heavy existing or potential freight traffic means there is no spare capacity for commuter trains. Commuter trains should not expect to operate on freight railroad-owned lines unless capacity is added. Whether capacity can be added requires a case-by-case analysis of conditions "on the ground." Regardless, freight railroads should only be expected to pay for capacity enhancements that truly benefit them and that they actually want, not for capacity enhancements made for the benefit of commuter rail operations. The benefits of commuter rail are primarily public benefits, so the public should pay for them

Due to the nature of commuter operations, capacity requirements that support the level of service they may require may differ markedly from those needed to fully support freight or Amtrak services. Commuter operations typically have morning and evening "peaks" which

require far more capacity to support on-time schedule keeping than do normal freight or passenger operations which are more evenly distributed throughout the day. It should be recognized that a commuter authority's capacity responsibility may substantially exceed that of a tenant that has a more constant allocation of operating requirements.

The same Act that provides for STB mediation of freight rail-commuter access disputes also mandates the installation of Positive Train Control (PTC) systems on freight lines that carry passengers or toxic inhalation hazard materials. It should be recognized that where a commuter authority is the sole reason for PTC installation, it should be required to pay all of the costs associated with it, including equipping the right-of-way and locomotives with these systems. Where the commuter railroad shares the line of the freight railroad with other traffic that requires PTC installation, the commuter railroad should pay its allocated share of such costs

Freight Railroads Must be Protected From the Liability Associated With Passenger Operations

The rail safety record is excellent, but given the level and complexity of railroad activity, the potential for accidents always exists. An accident involving a passenger train — which is usually much lighter than a freight train, often travels at higher speeds, and, most importantly, has passengers on board — is far more likely to involve significant casualties than a similar accident involving a freight train. Because of these risks, freight railroads must receive adequate protection from liability before allowing passenger trains and their passengers on their property

Operating Issues Must Be Addressed

The STB should develop a list of operating considerations that each party should address in any mediation involving access to freight railroad owned property. While freight

railroad access issues are often based upon concerns over capacity needs, property rights, appropriate compensation, and liability protection, operational issues often underlie those concerns. The freight railroads believe it would be helpful if the STB provided, through regulations or a policy statement, operating issues that the STB would suggest the parties address in any mediation. While the parties would not be "required" to discuss each issue, the list would provide an opportunity to ensure that all relevant issues were "on the table" and that any disagreement did not result from some unstated concerns that were not addressed.

U.S. freight railroads' efficiency and cost-effectiveness save businesses and consumers untold billions of dollars each year and greatly enhance our economic competitiveness. These benefits should not be jeopardized by imposing commuter rail service without regard to freight railroads' needs. The goal of reducing pollution and highway congestion by expanding commuter rail will not be realized if passenger trains interfere operationally or financially with freight service and force freight onto the highways or prevent railroads from meeting future growth in freight transportation demand. Thus, a critical objective in the STB's mediation of access disputes must always be to preserve and expand the freight railroads' ability to provide the freight transportation services our nation needs.

Recommendations and Conclusion

Along with its predecessor, the Interstate Commerce Commission, the STB has been closely associated with the remarkable revitalization of the freight rail industry. As a result, *the STB is keenly aware of the challenges facing freight railroads and rail infrastructure in the future.* This understanding can — and, we respectfully suggest, should — inform the STB in fulfilling its responsibilities under the Act

With respect to performance measurement, overall Amtrak train performance cannot be reasonably evaluated by viewing one aspect of the operation or one measurement in isolation. Events are interrelated, and all relevant factors must be included and measured as part of the overall performance assessment. Appropriate performance measurements begin with a realistic, achievable standard that overlays a realistic, achievable schedule. Having these would help avoid public misconceptions about rail performance and would facilitate practical, long-term industry solutions.

As a general matter, AAR recommends that the following principles be promoted by the STB in fulfilling its roles under the Act:

- A uniform approach to measuring passenger train performance on Amtrak and the host railroads should be established.
- An effective methodology or measurement system should seek to assign proper accountability, separate controllable delays from other delays and must begin with measurement against schedules reflecting actual operating conditions.
- Schedules should incorporate issues of congestion, capacity, and traffic volumes reflecting the unique challenges and characteristics of each rail line.
- More flexible scheduling practices should allow for allocation of reasonable track time for maintenance, while also providing more reliable transit and arrival time expectations to Amtrak customers during work periods.
- Train performance measurements and delay reporting accuracy must be improved and should leverage existing technology where possible.
- A transparent performance measurement regime should be established to permit policymakers to assess responsibilities for our nation's rail system and foster solutions to improve service for Amtrak's customers
- Extreme concepts of priority have impacts that must be considered unacceptable as public policy. The freight railroads suggest that the ultimate question in this debate is rail line capacity and priority should reflect the operating conditions and capacity of a rail line.
- The STB's non-binding mediation process for resolution of freight rail-commuter rail disputes should recognize the value that both parties bring to the economy.
- The basic principles reflecting voluntary agreements, full compensation, capacity investment, liability protection, and resolution of operating issues should be the cornerstone of the STB mediation process

The freight railroads believe that the recommendations offered here, if implemented, would foster a collaborative industry effort to advance passenger and freight rail transportation in America.